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Chairman: Mr. ZARIF (Islamic Republic of Iran)

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AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued)

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The meeting was called to order at 10.10 a.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued) (A/47/10, A/47/95, A/47/441-S/24559; A/CN.4/442)

1. Mr. FSADNI (Malta) said that his delegation reiterated its support for the establishment of an international criminal court, and stressed the growing need for such a body, bearing in mind the widespread violations of international humanitarian law in the former Yugoslavia, which had shocked international public opinion. The international community and, in particular, the Sixth Committee and the International Law Commission must find lasting solutions to admittedly complex issues.

2. Malta accepted the conclusions set forth in subparagraphs (a) and (b) of paragraph 104 of the report, to the effect that the Commission had concluded the task of analysis of the question, and that a structure along the lines of that suggested by the Working Group could be a workable system. His delegation also supported the granting of a new mandate to the Commission to draft the statute of the proposed international criminal court.

3. He wished, however, to place on record his views on some of the more important issues. In the first place, he agreed that the international criminal court should be established by a statute in the form of a treaty agreed to by States parties, but he had difficulties with the proposal that the court should not be a full-time body but should be constituted on each occasion that it was required to act. In his view, the consequential weakening of the court caused by the lack of continuity and its diminished independence and authority might undermine its continued existence.

4. With regard to the court's jurisdiction ratione materiae, Malta favoured a flexible regime with States parties to the court's statute being given the option of specifying which international crimes they would accept as falling under the jurisdiction of the court. That raised the issue of whether the court could exercise jurisdiction in relation to crimes under customary international law which had not been incorporated in or defined by treaties in force. His delegation believed that the principle of nullum crimen sine lege should prevail, it being established that the court could exercise its jurisdiction only over crimes defined in an acceptably precise manner in treaties.

5. On the issue of the linkage between the proposed Code of Crimes against the Peace and Security of Mankind and the establishment of an international criminal court, his delegation believed that such a linkage could prove detrimental at the early stage, and therefore agreed with the conclusion arrived at in paragraph 463 of the report, to the effect that the statute of the court and the Code should be separate instruments, and that a State should be able to become a party to the statute without thereby becoming a party to the Code.

(Mr. Fsadni, Malta)

6. On the issue of the jurisdiction ratione personae of the court, the Commission appeared to be confident that a general solution that would satisfy the different jurisdictional systems in existence without rendering the court's jurisdiction virtually meaningless was within grasp. The Commission should explore that solution further, as that could well mean the elimination of the single most important obstacle to the establishment of the court.

7. Although it would be premature to comment on administrative arrangements for the court, Malta would prefer for it to be within the United Nations system, inasmuch as that would strengthen its universal character and allow for the possibility of utilizing structures that already existed in the Organization.

8. The Working Group had dealt in some detail with the issues of applicable law, penalties and due process, as well as the prosecution aspects of the subject. Those issues of a more technical nature should be examined in further detail, and his delegation endorsed the Working Group's assumption that the court should not be empowered to try an accused person in absentia; the bringing of the defendant before the court was a question of paramount importance.

9. Finally, his delegation felt it was important to comment on the grave situation obtaining in the former Yugoslavia. Malta welcomed, as an initial step, Security Council resolution 780 (1992) on the establishment of an impartial Commission of Experts to examine evidence of grave violations of international humanitarian law committed in that territory, and supported the suggestion made by the representative of Austria that an ad hoc criminal jurisdiction should be created to deal with the alleged war crimes and crimes against humanity committed in the former Yugoslavia.

10. Mr. DE SARAM (Sri Lanka) said that the questions whether an international criminal court should be established and, if so, what its form should be, were not easy to answer, and gave rise to a number of considerations that needed to be examined. The problems were not of a strictly legal or technical nature, but rather of an international political character, and could be summarized in certain beliefs and uncertainties. In the first place, there was the belief that the establishment of a network of bilateral or multilateral extradition arrangements ("try or extradite" clause) between States could achieve the same purpose as an international criminal court. In the second place, there was uncertainty as to how the establishment of an international criminal court would accord with sovereignty or matters essentially within domestic jurisdiction. There was also concern as to what the costs of establishing the court would be, and who would bear such costs. Lastly, it was believed that an international criminal court should be a standing body with permanent judges, who could contribute in a continuing and consistent manner to international criminal-law doctrine and jurisprudence. There was some justification for all of those considerations.

(Mr. de Saram, Sri Lanka)

11. With respect to the first question, it had been demonstrated that the existing extradition system did not work very well, and that it was a source of serious jurisdictional conflicts between States, which were disruptive to inter-State relations. In that regard, the usefulness of an international criminal court was obvious, inasmuch as it would also serve as a deterrent to international crime and would provide the important logistical base which a trial of an alleged international criminal would necessitate, and which the economic and social structures and criminal justice systems of many countries would not be in a position to supply.

12. There were, as well, reasons of a more abstract nature for advocating the establishment of an international criminal court. In the first place, there had been an increased "global consciousness" and a great sense of oneness amongst the peoples of the world, as evidenced at the United Nations Conference on Environment and Development, held in Brazil. To that must be added the end of the cold war, which had made it possible to overcome distrust and suspicion, and the fact that the world community had begun to look more and more to the United Nations for solutions to international problems.

13. The question whether there should be an international criminal court had been asked when the Convention on the Prevention and Punishment of the Crime of Genocide had been adopted in 1948, and again when the International Convention on the Suppression and Punishment of the Crime of Apartheid had been adopted in 1973. The question had been raised once again in 1990, when the General Assembly had felt it timely that the International Law Commission should consider it. The Commission had completed the first stage of its work, and it was now up to the General Assembly to decide what course the Commission should follow next.

14. In accordance with the clear recommendation contained in the Commission's report, the international criminal court should be constituted by treaty and should be convened only as required, by way of a procedure to be prescribed. The court would have a precise jurisdictional coverage, and each State would be able to introduce "optional" elements in the court's statute. Finally, the court would not have exclusive competence, and, when convened, would function concurrently with the present bilateral and multilateral "try or extradite" treaty-network system.

15. The proposal was reasonable and realistic, and took into account the hopes and demands of the world community, the inadequacies of the existing system established in bilateral or multilateral treaties, the sensitiveness of States on matters relating to their sovereignty and domestic jurisdiction, the severe financial constraints that affected all States, and the importance of doing everything possible to ensure that there was general consensus in the United Nations, whatever might be the result of the deliberations on the subject.

(Mr. de Saram, Sri Lanka)

16. Moreover, according to the Commission's proposal, the Sixth Committee should not for the time being commit Governments to acceptance of an international criminal court, but should merely recommend to the Commission that it should continue its work on the lines proposed, and submit to the General Assembly in 1993 a fuller report on the matter.

17. Finally, it was also very important that Governments should be consulted, at every possible stage, and not only departments or ministries of foreign affairs, but also national authorities in the fields of criminal law and criminal justice administration. It would be important, however, to approach Governments for their views at the right time, and not too early, since it was possible that premature consultation would not really serve a useful purpose or might even be counter-productive.

18. Mrs. FLORES (Uruguay) said that the fundamental issue posed by chapter II of the Commission's report was whether the Commission should begin to prepare the draft statute of the international criminal court, and if so, whether it should continue its work on the basis of the propositions contained in paragraph 396 of the report. The issue was not a new one, although recent developments on the international scene had highlighted its renewed relevance. Accordingly, her delegation was in favour of the Commission being given a fresh mandate to draft such a statute, as a matter of priority.

19. As far as the court's jurisdiction was concerned, the report restricted it to individuals. Such a restriction could prove a valuable starting-point, but did not take into account the situation envisaged in article 19 of the draft articles on State responsibility, which distinguished between international crimes and international delicts and was one of the most significant steps forward in the codification of the juridical regime of State responsibility. In that draft, the Commission established that in addition to making reparation, the State that had committed the international crime could be sanctioned.

20. Her delegation shared the view that the subject-matter jurisdiction of the court should be limited to crimes of an international character defined in international treaties in force, including the draft Code of Crimes against the Peace and Security of Mankind.

21. Regarding the link between the court and the draft Code of Crimes, Uruguay believed that they were two separate projects, and accordingly that a State could be a party to the court's statute without thereby becoming a party to the Code, and vice versa. It also favoured a system of compulsory and exclusive jurisdiction which offered the possibility that not only States, but also individuals, could have access to the court, and which included the right of appeal, which was a fundamental guarantee in any criminal procedure.

(Mrs. Flores, Uruguay)

22. In terms of structure, the court should be a permanent body on account of the importance and number of cases that could be set before its jurisdiction. Many aspects of the issue still had to be considered. To do so, her delegation suggested progressing step by step, perhaps by means of a working group that would set itself short- and medium-term targets.

23. Mr. CASTILLO (Venezuela) said, regarding the establishment of an international criminal court, that the Commission had completed its technical analysis of the issue and that there was need for it to be granted a special mandate to prepare a draft statute and the law applicable under the international criminal jurisdiction.

24. His delegation had consistently expressed its support for the establishment of an international criminal court to try crimes of an international character. That position, which was justified by recent developments in the international sphere, had been reasserted by the President of Venezuela at the Summit Meeting of the Security Council, held on 31 January 1992.

25. In practice, the international jurisdiction would not be able to base itself on the existence of alleged partiality in national courts. It was rather a question of principle: the international community required a competent body to try crimes that affected it. Naturally, the question raised complex and difficult issues to which the court's statute should provide solutions. There would be no justification for establishing of legal mechanisms such as observers at national judicial trials, ad hoc courts to hear specific cases or the advisory opinions of the International Court of Justice.

26. With regard to the court's structure, Venezuela suggested that it should be full-time and that careful attention should be paid to its possible links with the International Court of Justice, in order to determine whether the court should operate as a chamber of that Court or independently. The jurisdiction of the court should be compulsory in respect of serious international crimes, and when States became parties to its statute, they should undertake to accept its jurisdiction. In his delegation's view, the jurisdiction of the court should also be exclusive, although it would be acceptable if it were restricted to specific crimes such as genocide, aggression, intervention, colonialism, serious human rights violations, apartheid, illicit international trafficking in narcotics, hijacking of aircraft, and kidnapping of diplomats or other internationally protected persons.

27. The subject-matter jurisdiction of the court should extend to crimes of an international character defined in international treaties in force and to those defined in new instruments such as the Code of Crimes against the Peace and Security of Mankind. The right to bring charges, file complaints or make appeals to the court should be exclusively limited to States, provided they

(Mr. Castillo, Venezuela)

were parties to the statute and involved in the case. The establishment of the position of prosecutor for that purpose did not seem advisable. Nor did it seem advisable to include in the Statute a provision analagous to Article 35 of the Statute of the International Court of Justice.

28. The rights of the accused and the trial procedure should be regulated by the court's statute. In that respect, it would be inopportune to follow the wording of Article 38 of the Statute of the International Court of Justice, which applied to different cases. The proposed court should be competent not only to try the accused, but also to rule on civil liability. A relevant precedent was article 63 of the American Convention on Human Rights regarding the powers of the Inter-American Court of Human Rights.

29. The statute should also make the necessary distinction between handing over an accused to the court and extradition, which were different matters. His delegation considered that the "double hearing" principle, as set out in article 14, paragraph 5, of the International Covenant on Civil and Political Rights, would be difficult to implement in international procedures and jurisdictions. The statute should contain provisions that were sufficient to guarantee the rights of the accused and an objective procedure, in order to ensure that the court's judgements were reliable and to avoid their being reviewed by other jurisdictions.

30. To conclude, his delegation proposed that the Commission should be given the necessary mandate to begin to prepare the statute of the court, which in its view, should be in the form of an international treaty.

31. Mr. VARGAS-CARREÑO (Chile) said that the question of the establishment of an international criminal court should be considered separately from the issue of the Code of Crimes against the Peace and Security of Mankind, despite the clear link between them. That approach could help further to develop international criminal law and achieve broader participation by States in each of the projects.

32. His delegation did not share the view that extending universal jurisdiction to national courts and international cooperation in respect of extradition were not the most suitable mechanisms for combating international crime. In certain Latin American countries at least, there had recently been fundamental changes to previous practice. The national courts had begun to implement as national law, in trying serious human rights violations, international instruments such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights. Furthermore, the practice of handing over known foreign criminals by means of administrative expulsion had developed and new bilateral and multilateral treaties on extradition had been drawn up. His delegation approved of the inclusion in the Code of a fundamental norm stipulating the obligation of States to try or extradite those responsible for crimes against the peace and security of mankind.

(Mr. Vargas-Carreño, Chile)

33. In principle, Chile had no objection to the establishment of an international criminal jurisdiction, as there were a number of arguments in favour of gradually establishing an international criminal court. However, as a rule, the jurisdiction of the international court should be subsidiary to that of the national courts. In practice, the international court should merely be a means made available to States parties to its statute whereby they could guarantee justice and ensure that specific serious crimes did not remain unpunished.

34. The arduous and complex issues posed by the question had to be addressed with caution, flexibility and a sense of practicality. Regarding the court's structure, it should not for the time being that of be a permanent full-time body, but a machinery that would permit the court to meet on each occasion that it was required to act. The composition of the court would be decided in each specific case on the basis of objective criteria that would ensure the impartiality of its members.

35. With regard to the court's jurisdiction, his delegation thought that it should be compulsory in the case of crimes of extreme gravity of which humanity as a whole could be considered the victim, such as genocide. In the case of other crimes, which, however serious, were not of such magnitude, its jurisdiction could be optional and accepted where appropriate by the State concerned.

36. With regard to the relationship between the international criminal court and national courts, his Government stressed that the international jurisdiction must be subsidiary, which meant that no State that wished to investigate and punish a crime against the peace and security of mankind must be denied an opportunity to exercise its jurisdiction. The only case in which the international court could have sole and exclusive jurisdiction was where a State could not try the alleged author of a crime in respect of which the court had compulsory jurisdiction, such as genocide. In no circumstances could the international court exercise jurisdiction as a court of appeal or court of second instance in respect of decisions reached by a national court.

37. The Commission should study the possibility of the international court exercising advisory jurisdiction at the request of the States parties to its statute in order to assist national courts in properly applying and interpreting the international instruments that defined crimes against peace and security that were within their cognizance. In that regard the advisory powers of the International Court of Justice and of the Inter-American Court of Human Rights had been extremely positive.

38. With regard to the applicable law, the court should take cognizance only of offences defined in international instruments, including the draft Code of Crimes against the Peace and Security of Mankind.

(Mr. Vargas-Carreño, Chile)

39. As to whether the court should take cognizance only of crimes committed by individuals or whether its jurisdiction should also extend to States, his delegation was in favour of the first alternative, since the trial of States would raise very serious difficulties and, in any event, other means were available under international law to punish unlawful conduct by States. As a counterpoint to the lack of jurisdiction of the international court in cases of wrongful acts by States, the roles of the Security Council and the International Court of Justice must be strengthened, as must international machinery to protect human rights.

40. On the subject of State responsibility, it was still not apparent when States might reach agreement. Nevertheless, the absence of ideological confrontation as a result of the ending of the cold war and the increased opportunities in the current state of international relations to seek and achieve consensus offered favourable circumstances which must be taken advantage by to advancing the topic as quickly as possible as a priority in the work of the Commission in the years ahead.

41. Referring to the instrumental consequences of an internationally wrongful act, namely the question of countermeasures, he said that the question had virtually no similarity with the regime of State responsibility recognized by national legal orders. Further, the fact that no adequate international framework existed under current international law made it difficult to determine any elements for the regulation of the conduct of States.

42. Further, while there was a wealth of inter-State practice, the elements of lex lata were not by themselves sufficient for codification and they would need to be complemented by a progressive development of the question taking into account current international realities, different legal systems and the need to devise formulas that would lead to consensus solutions.

43. As indicated in the Commission's report, the basic requisite for legitimate recourse to a countermeasure was the commission of an internationally wrongful act that infringed the right of the State in question. In the view of his Government it was not enough for the allegedly injured State to believe in good faith that an internationally wrongful act had been committed against it, so that a State taking countermeasures on the basis of such an assumption must assume responsibility for its conduct and must itself accept international responsibility if it was concluded that no right had been violated. The principal objective of countermeasures was to bring about the cessation of unlawful conduct, compensate for injury caused or ensure that the act would not be repeated. On the other hand, its criminal role was questionable, given which his Government did not think it appropriate for the Commission's draft to embrace a punitive function.

44. He stressed that countermeasures could not be taken automatically and must, in principle, be preceded by some form of protest, notification, demand or warning. Further, he fully supported the proposal that the injured State

(Mr. Vargas-Carreño, Chile)

should not be able to take any countermeasures without having previously exhausted all the procedures for an amicable settlement available under general international law, the Charter of the United Nations or any other dispute settlement instrument to which the State was party, and without having communicated its intention in a timely and proper manner. Of course, that condition could not apply if the State which had committed the internationally wrongful act did not cooperate in good faith in the choice and implementation of the peaceful settlement procedures.

45. His Government had serious doubts as to the advisability of including provisions relating to interim measures of protection, and, in particular, the express authorization of such measures before initiating a peaceful settlement procedure or during the course of such a procedure. Even though in some specific circumstances it might be legitimate and in accordance with international law, to include provisions relating to interim measures of protection would give rise to more difficulties then advantages.

46. He concurred in the prevailing view that the application of countermeasures should be proportional, taking into account not only the quantitative but also the qualitative aspects of the injury caused. In his view, countermeasures could be adopted only with due respect for the fundamental norms of international law, so that the injured State must refrain from the use of countermeasures involving the threat or use of force or any conduct at variance with the norms of international law for the protection of human rights that would occasion injury to the normal discharge of diplomacy or that would contravene a norm of jus cogens, or where the conduct involved an obligation with regard to any State other than that which had committed the internationally wrongful act.

47. With respect to the provision in the draft approved by the Commission in first reading by which the legal consequences of an internationally wrongful act of a State would be subject to the provisions and procedures of the United Nations Charter relating to the maintenance of international peace and security, he had serious doubts as to the advisability of including such a norm, which raised issues which went beyond that of the international responsibility of the State and which, rather, related to the settlement of disputes, the distinction between legal and political disputes and the competence of the Security Council and its relationship with other organs of the United Nations, in particular the International Court of Justice. The Commission should carefully examine the proposal that the legal consequences of an internationally wrongful act should be subject to Chapter VII of the United Nations Charter.

48. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, he said that it was a relatively new topic within which the elements of lex lata were not sufficiently developed and there was a need to give particular priority to the

(Mr. Vargas-Carreño, Chile)

further development of international law in protection of the environment. In general, his delegation agreed with the Commission's report in that area.

49. With regard to other Commission decisions and conclusions, he welcomed the appointment of Mr. Rosenstock as Special Rapporteur on the law of the non-navigational uses of international watercourses and accepted the Commission's decision not to continue consideration of the topic of relations between States and international organizations during the terms of its present members given that the majority were of that view. Nevertheless, he hoped that the Commission would shortly decide to consider the question of the legal status, prerogatives and immunities of international civil servants, since the application by analogy of the Vienna Convention on Diplomatic Relations had created difficulties and had led to the commission of legal errors by Ministries of Foreign Affairs which could have been avoided had specific norms on the matter existed.

50. Lastly, his Government wished to encourage the Commission to continue two important activities which it had so far pursued with great efficiency, namely, cooperation with regional legal organizations, in particular, the European Committee on Legal Cooperation, the Asian-African Legal Consultative Committee and the Inter-American Juridical Committee, and the organization of the international law seminar intended for students with qualifications in international law and young instructors or officials of Ministries of Foreign Affairs, in connection with which he hoped that the number of fellowships could be increased.

51. Mr. BERMAN (United Kingdom) said that his delegation had already, in its capacity as President of the European Community, described the general approach of the Community and its member States to the question of the establishment of an international criminal court; he wished to add some comments on behalf of the United Kingdom.

52. Throughout the contemporary era there had been, and there continued to be, serious violations of rules for which, under international law, the perpetrators bore criminal responsibility; however, such perpetrators had seldom been called to account by the legal process. Efforts had been made in the Sixth Committee and other bodies to define offences under international law and to establish the obligation to punish them. The purpose of such international efforts was not punishment alone, but deterrence. His delegation wished to explore the possibility of finding practical solutions. It was to be hoped that that was exactly what the Commission proposed to do under the new mandate which it sought and which his delegation believed it should be given. The Chairman of the Commission had rightly pointed out that States should not ask the Commission to embark on the elaboration of a draft statute without first agreeing that the task was a worthwhile one. His delegation was prepared to provide such assurances.

(Mr. Berman, United Kingdom)

53. At the current, preliminary stage, it was possible to identify some things which were not being done. No one was seeking to eliminate national jurisdiction, but to complement it; no one was seeking to impose criminal responsibility where none had previously existed; and no one was proposing that accused persons should be tried in absentia. Those points helped to define the framework within which the Commission should proceed; the Commission's attention should be focused on issues which would need to be resolved and, in particular, on the following three areas: prosecution, evidence and punishment. To begin with evidence, there could be no question of successful prosecutions without sufficient evidence; indeed, evidence was essential. The issues with regard to evidence went beyond relatively straightforward matters, like the collection of evidence; they included the preservation, admissibility and relevance of evidence, the burden of proof, identification evidence, corroboration, expert witnesses, the right to silence, the right to confront the accuser, and so on. It was difficult to imagine how an international court could function without applying a unified set of rules to all cases.

54. The question of prosecution went beyond the issue of the possible establishment of an international Prosecutor's Office. It included such matters as ethics, the Prosecutor's duties towards the court and the defence, the Prosecutor's discretionary powers and the basis for deciding whether a charge should be maintained or dropped. The norms of criminal prosecutions varied widely from one legal system to another and should, accordingly, be specifically regulated.

55. With regard to punishment, his delegation wondered which State would bear the burden of implementing a sentence, how that would be decided in each case and whether the assumption could be made that issues concerning confidence and partiality, which formed the underlying rationale for the establishment of an international court, would cease to apply at the level of punishment. It would also be necessary to deal with questions of punishment regimes, access, pardon, parole and the issue of the death penalty.

56. The United Kingdom had previously been hesitant to give consideration to the possibility of the establishment of an international criminal court except in the context of the implementation of a code of crimes. After having reviewed the arguments in the Working Group's report, his delegation agreed that the Commission's mandate should be to prepare a draft statute in the form of a treaty to which States could become parties without thereby becoming parties to an eventual code.

57. Mr. KRAICHITTI (Thailand) said that an international criminal court could be established by means of a statute in the form of a treaty as recommended by the Working Group, and could be formally incorporated into the United Nations structure, probably by means of a General Assembly resolution. The court should be part of the United Nations or should be brought into relationship with it; that was the only way to ensure a sufficient degree of international support for its establishment and operation.

(Mr. Kraichitti, Thailand)

58. In view of its objective, which was to try individuals accused of committing international crimes, and not to settle disputes between States, the court should not be established on an ad hoc basis. It should not, however, be a full-time body, but a pre-existing mechanism which could be called into operation as required. Each State party to the statute could nominate a number of qualified persons to act as judges when the need arose.

59. The court should not have compulsory jurisdiction. If a State became a party to the court's statute, that would not automatically imply its acceptance of the court's jurisdiction over particular offences. States parties to the statute could accept the court's jurisdiction in relation to a particular offence, or in advance, for a specified category of offences. The court's statute and the draft Code of Crimes should constitute separate instruments.

60. A State should be able to become a party to the statute while remaining free to confer jurisdiction on the court with regard to certain crimes defined in the draft Code of Crimes or other international conventions. A State which accepted the court's jurisdiction should be required to hand over accused persons to the court at the request of another State which had accepted the same obligation. In becoming parties to the statute, States should accept certain administrative obligations relating to the court's operating expenses, the nomination of its judges and the custody of accused persons.

61. The court's jurisdiction should be limited to crimes of an international character as specified in existing international treaties, including the draft Code of Crimes against the Peace and Security of Mankind. The court should exercise jurisdiction only over the most serious offences, such as war crimes, genocide, hostage-taking, the hijacking of ships and aircraft, and so on. The conventions which constituted the source of law could be listed in the court's statute. The desirability of such a court was related to the question of whether the existing system of universal jurisdiction was sufficiently effective to cope with a large number of international crimes. Moreover, the feasibility of its creation was linked to the political will of the majority of States and the technical and legal difficulties which States must overcome. Much time and energy had been spent on answering those questions in the Commission and other international legal forums.

62. The Thai delegation believed that, while the arguments over the desirability or feasibility of a court might continue, further consideration could, none the less, be given to the basis for its establishment; Thailand was therefore of the view that the Commission should prepare a draft statute for the court. In carrying out that mandate, the Commission should take into account not only the views on the subject expressed in the current debate, but also the written observations, to be transmitted by Governments, on the guidelines contained in the Working Group's report.

63. Mr. ECONOMIDES (Greece) said that his delegation's views concerning the establishment of an international criminal court had been reflected in the statement made by the United Kingdom representative on behalf of the European Community and its member States; the Greek delegation wished to make some additional comments on the subject.

64. Greece shared the view that it was necessary to establish an international criminal jurisdiction, for reasons not only of suppression and punishment, but also of prevention. With regard to the Working Group's basic propositions (A/47/10, para. 396), his delegation made the following clarifications: it agreed that the court's statute should be prepared in the form of a multilateral treaty, concluded within the framework of the United Nations by the greatest possible number of States, which would then become parties to the instrument; that the court should exercise jurisdiction only over private persons, as distinct from States; that the court's jurisdiction should extend to all crimes of an international character, both those defined in the various treaties in force (for example, the Convention on the Prevention and Punishment of the Crime of Genocide, the four Geneva Conventions of 1949 on humanitarian law and the two Protocols additional to those Conventions), and in the draft Code of Crimes against the Peace and Security of Mankind or in future international conventions. International practice should, for the time being, be rejected as a source of international criminal law. The Commission hoped to complete the second reading of the draft Code by 1996; that would fill a large gap in international criminal law for the international community. With regard to the relationship between the draft Code and the court, Greece supported the most formal and organic relationship possible: each State which became a party to the draft Code should automatically accept the court's jurisdiction.

65. The court's jurisdiction should extend, at least in so far as the most serious international crimes were concerned, to all States which accepted, ratified or acceded to its statute, without any need for an additional declaration. Exclusive jurisdiction was preferable for all crimes defined in the Code or at least for all crimes against peace and security and the most serious war crimes. For other crimes, its jurisdiction could be concurrent, in which case priority for bringing criminal prosecutions would lie with national courts.

66. With regard to the practical arrangements for the court, there was no need for a permanent body, but rather a mechanism which could meet rapidly whenever necessary. The other mechanisms proposed (A/47/10, paras. 473-487) were not appropriate for the purposes of resolving the problem facing the Commission. Finally, a regular, independent and impartial judicial procedure should be established, with full respect for the rights of the accused. His delegation fully agreed that the Commission should be given a mandate to draw up a draft statute for an international criminal jurisdiction.

(Mr. Economides, Greece)

67. With regard to State responsibility, the Special Rapporteur had proposed five draft articles concerning countermeasures; however, there was some doubt as to whether that question should be dealt with in the framework of international responsibility. In addition, the said provisions contained terms and expressions which were not clear, such as the expressions "adequate response" and "not to comply with one or more of its obligations" contained in article 11, and the expressions "the amicable settlement procedures available" and "the State ... does not cooperate in good faith in the choice and the implementation of available settlement procedures" contained in article 12. Article 12, paragraph 3, was ambiguous in its entirety, and the expression "out of proportion" in article 13 was vague. The same was true of the expression "conduct which ... is of serious prejudice to the normal operation of bilateral or multilateral diplomacy" contained in article 14.

68. Moreover, article 12 was very hard on the injured State. Whereas the State which had committed the internationally wrongful act seemed to have no obligations, the injured State was, in principle, required to exhaust all available settlement procedures before taking the appropriate countermeasure, to provide appropriate and timely communication of its intention, and even to renounce the countermeasure if it was not "in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered", which provision deprived it of any possibility of reacting to serious or very serious offences. Clearly in such cases a third party would have to intervene in the interest of peace, international security and justice, and under the United Nations Charter, that third party could only be the Security Council. In any case, the Commission had not, as yet, given sufficient thought to the question of countermeasures; it should do so in connection with the provisions on collective security.

69. With regard to chapter IV of the report concerning international liability for injurious consequences arising out of acts not prohibited by international law, while appreciating the Special Rapporteur's efforts, he felt that no significant progress had yet been made. He hoped that the new guidelines laid down by the Commission would pave the way for progress to be made the following year.

70. Concerning chapter V of the report, he supported the planning of the Commission's activities for the term of office of its members and endorsed the decision to defer consideration of the topic "Relations between States and international organizations". In addition, as part of the Commission's long-term programme of work, further consideration should be given to the questions relating to succession of States, with particular reference to international organizations and the nationality of natural and legal persons, as well as the question proposed by the representative of Cyprus concerning the implementation of United Nations resolutions; the latter had assumed still greater importance following the recent Security Council decisions, which were binding on States and should be implemented rapidly.

(Mr. Economides, Greece)

71. Finally, in the context of the Decade of International Law, the Commission should pay special attention to its own function, which was to see to the progressive development and codification of international law, and should propose firm measures to strengthen and improve that function in terms of both quality and quantity.

72. Mrs. SKRK (Slovenia) said that the idea of creating an international criminal court had long preoccupied statesmen and scholars, but had yet to be put into practice by States. The entire international community was currently witnessing massive violations of humanitarian law and crimes against humanity in Bosnia and Herzegovina and, unless there was some response from the competent international bodies, the alleged offenders would never be brought to justice. Her country had been the first to suffer from the aggression of the army acting on behalf of the former Yugoslavia, and her delegation would therefore welcome any progress made by the Commission on the draft Code of Crimes against the Peace and Security of Mankind and on the statute for an international criminal court.

73. She supported the idea of establishing an international criminal court which, in her view, should be an independent and standing body, rather than an ad hoc organ. Although the court need not necessarily be a United Nations body, it could be associated with the United Nations system. The court should be established by a treaty between States parties, which treaty should include the court's statute; she agreed with the Working Group that the court should not have compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the statute was obliged to accept ipso facto and without further agreement.

74. A better solution, and one which would achieve concrete results, would be to make acceptance of the court's jurisdiction a separate act, by means of an optional clause or on the basis of a special agreement. States not parties to the statute should also be able to bring cases before the court, by means of ad hoc acceptance of its jurisdiction. Clearly, the statute of the future international criminal court and the draft Code of Crimes should be two separate legal instruments, which States could ratify independently.

75. In order to guarantee the effectiveness of international criminal proceedings, a body separate from the criminal court should be established with the task of collecting evidence against alleged offenders and subsequently assuming the function of prosecutor. Other speakers had already mentioned the Commission of Experts established by Security Council resolution 780 of 5 October 1992 to collect evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia. The International Fact-finding Commission established under article 90 of Additional Protocol I of 1977 to the Geneva Conventions of 1949 was a good example of an impartial and independent fact-finding body.

(Mrs. Skrk, Slovenia)

76. The tenth report of the Special Rapporteur (A/CN.4/442) drew a distinction between the law applicable by an international criminal court and its jurisdiction ratione materiae. Her delegation believed that the substantive and procedural norms that the court should apply were those of treaty law, since the direct application of international customary law might jeopardize respect for the principle nullum crimen sine lege. The court's jurisdiction ratione materiae could be a compromise between the exclusive jurisdiction of the court and the concurrent jurisdiction of the States parties to its statute, as long as the principle non bis in idem was respected; the court should not have an appellate character in relation to the national criminal proceedings of those States, however.

77. The court should also have exclusive and compulsory jurisdiction for grave war crimes, systematic violations of human rights, international drug trafficking, the taking of hostages and the crime of apartheid. Slovenia fully shared the position of other delegations which had described the "ethnic cleansing" of the Muslim population in Bosnia and Herzegovina as genocide.

78. International drug trafficking represented the trans-frontier social plague of the century; in order to achieve its effective suppression, that crime and related crimes should be treated as crimes against humanity, as in the case of its predecessors, piracy and slavery.

79. As to court's jurisdiction ratione personae, it should apply to alleged perpetrators of the crimes included within the court's jurisdiction ratione materiae, since such crimes involved political and other representatives of State bodies and other perpetrators not directly related to those bodies. In that respect, the problem of the treatment of juvenile offenders by an international court needed to be considered. In such cases, the court should comply with the provisions of the Convention on the Rights of the Child, which was applicable to every person below the age of 18. It should also be borne in mind that the First Additional Protocol to the Geneva Conventions of 1949 relating to the protection of victims of international armed conflicts explicitly prohibited the execution of the death penalty for an offence related to armed conflict on persons who had not attained the age of eighteen years at the time the offence was committed. Capital punishment was forbidden by the Slovenian Constitution and, therefore, her delegation believed that the death penalty had no place among the sanctions of an international criminal jurisdiction.

80. The problem of turning over a suspected offender to the court raised the sensitive question of the seat of that criminal body, if it was decided that it should be a standing body. In that respect, the idea of "ceded jurisdiction" as presented by the Working Group seemed attractive.

(Mrs. Skrk, Slovenia)

81. As to procedure, the accused should be offered the minimum procedural guarantees envisaged in article 14 of the International Covenant on Civil and Political Rights and the right to appeal on the basis of the "double hearing" principle as suggested by the Special Rapporteur.

82. In view of the clear need for an international criminal court, Slovenia felt that the General Assembly should renew the Commission's mandate so that it could continue its work on the matter as a priority issue.

83. Mr. SOLAIMAN (Egypt) said that recent events had made the community of nations aware once again of the need to establish an international criminal court. In addition, the currently prevailing atmosphere was favourable to the establishment of a new system, after the changes that had occurred in recent years in various parts of the world.

84. The establishment of an international criminal court, which was a matter of increasing urgency, would undoubtedly help accelerate the adoption and application of the Code of Crimes against the Peace and Security of Mankind. Naturally, the question required flexibility and careful consideration so as to incorporate in the new regime the proposals made by various delegations and thus achieve the greatest possible degree of participation.

85. Acceptance of the statute of the court should not involve automatic acceptance of its jurisdiction. Indeed, States should perhaps be free to accept that jurisdiction after they had acceded to the statute. In that context, the possibility of limiting the court's jurisdiction to certain crimes of an international nature such as genocide, international drug trafficking, air hijacking and other forms of international terrorism should be considered. With regard to the relationship between the statute of the court and the Code of Crimes against the Peace and Security of Mankind, his delegation felt that a distinction should be established between the two instruments so that a State could accede to either of them.

86. The statute of the court and the draft Code of Crimes against the Peace and Security of Mankind should be regarded as separate instruments, so that States could accede to the first without necessarily acceding to the second. Non-governmental humanitarian organizations such as the International Committee of the Red Cross should be able to have recourse to the court.

87. With regard to the specific recommendations made by the Working Group, he noted that there was general agreement that it would be preferable for the court to be established by means of a statute incorporated in a treaty between the States that wished to accede to that new international system; that the jurisdiction of the new court should be limited to crimes of an international nature defined in the international treaties in force, including the Code of Crimes against the Peace and Security of Mankind, once it was approved and had entered into force; and that at least at the first stage, the court's jurisdiction should be optional and binding only on States which accepted it,

(Mr. Solaiman, Egypt)

and limited to persons rather than States. It would perhaps be best, initially, to establish a provisional mechanism which would meet when necessary. He noted that the international community had taken almost 50 years to recommend the establishment of an international criminal court; it should not wait so long to put the idea into practice. He was in favour of giving a mandate to the Commission to prepare a draft statute.

88. Mr. AL-BAHARNA (Bahrain) said that, on the question of establishing an international criminal court, it was regrettable that the Commission was not in favour of setting up a full-time judicial body, on grounds of the need to avoid an expensive institutional mechanism, the possible lack of work for the court and the absence of international experience in the exercise of criminal jurisdiction. In his opinion, the idea of a standing court should not be shelved, even provisionally. A court which was a compromise facility would betray a lack of conviction and would be a far cry from the original conception of a vigorous bench dispensing international criminal justice and playing a leading role in developing criminal jurisprudence. It was gratifying to note that some members of the Commission were of the view that permanence was of the essence if an international court were to function on the basis of judges totally independent of other concerns except the administration of justice. As far as costs were concerned, the Commission should concentrate on the legal aspects of the question rather than on its financial problems, which were the business of the General Assembly. He felt that the very existence of a court which was able to function without fear or favour from national pressure would be a source of confidence and, consequently, of work.

89. His delegation believed that the court should be established by means of a statute. The election of judges should follow the system of the International Court of Justice, which ensured regional representation. The system suggested in the report of the Working Group was not ideal. A system of a panel of potential judges was open to the familiar criticism that it was not a court in the traditional sense of the word. The Commission needed to keep alive the proposals for a court along the model of the International Court of Justice.

90. On the question of the court's jurisdiction, he was of the view that the court should not have compulsory jurisdiction in the sense of a general jurisdiction which a State party to the statute would be obliged to accept ipso facto and without further agreement. Each State would be free to accept the court's jurisdiction either ad hoc in relation to a particular offence or in advance for a special offence or offences. His delegation accepted the proposition that the basic postulate was to provide States with plenary control over the trial of persons within their jurisdiction. Even so, a system in which States were free to accept or confer jurisdiction in relation to a particular offence would severely curtail the powers of the court and, therefore, his delegation believed that jurisdiction should be conferred in advance with respect to offences listed by treaty or otherwise in the statute.

(Mr. Al-Baharna, Bahrain)

91. His delegation supported the Working Group's approach that a broad range of crimes ratione materiae should be established. Although it might have been advisable to restrict jurisdiction to the offences contained in the draft Code, it was currently clear that it would be unsafe to exclude the relevant conventions from the scope of the court's statute. Although the court's jurisdiction should be limited to crimes defined by treaties in force, it might be necessary to make an exception in favour of the draft Code, since if the Code were merely one of several multilateral conventions mentioned in the statute of the court, the Code would be excluded from the statute until it came into force. That would thus exclude the crimes of intervention and colonial domination, since such crimes were neither defined nor prohibited in any multilateral treaties in force, and that was not an ideal situation. In order to fill that gap, the Commission should consider the possibility of giving a special place to the Code, by making it provisionally applicable as an annex to the statute.

92. On the question of jurisdiction ratione personae, he believed that it was one of the most difficult issues and therefore required in-depth study. In practice, the question of personal jurisdiction of the court devolved into one of determining which State might confer on the court the jurisdiction without which it would not be able to proceed. Customary international law contained a variety of principles with regard to the exercise of jurisdiction by States which helped to determine whether the State attempting to exercise jurisdiction had indeed the right to do so as against another State. A different approach was therefore justified where competing criminal jurisdictions of States was not an issue. In cases of genocide, for example, the proposed court might be seized of a crime committed within one State by and against nationals of that very State. Consequently, jurisdiction based not on analogies of competing State jurisdiction but on the precise crime itself might recommend itself.

93. With regard to the relationship between the Code and the statute, his delegation agreed that a State might accept the statute and reject the Code. However, the Commission should examine the possibility of giving the Code a special place in the statute. The Code should be an integral part of the United Nations system with a permanent staff. The fear was that, by sharing administrative staff resources, the confidentiality of criminal records and evidence might be jeopardized. His delegation would hesitate to subscribe to the system of "regional courts" constituted to try specific crimes, since the essence of the exercise was to achieve universality.

94. The Working Group's report (A/47/10, annex, paras. 473-487) examined some proposals on alternative trial mechanisms, including advisory opinions of the International Court of Justice and decisions of national courts. The comparison showed that the proposed court was indeed the optimal solution.

(Mr. Al-Baharna, Bahrain)

95. On the question of applicable law for the trials of offenders (ibid., paras. 68-80 and paras. 488-503), crimes should be of an international and grave character and must be clearly defined in an international treaty or other binding instrument. The Working Group was correct in rejecting the inclusion of crimes existing under customary international law. National laws should be referred to only in exceptional circumstances. Moreover, the Commission should consider that problem in the light of the solution presented in article 15 of the draft Code, which referred simply to the "general principles of law", a formula which was sufficiently broad as to encompass domestic legislation. As far as applicable procedure was concerned, the court should determine its own rules once it had come into being. The Statute and Rules of the International Court of Justice were appropriate examples. It was difficult for his delegation to comment on the precise formula modelled on Article 38 of the Statute of the International Court of Justice unless it had a clearer idea of what was included in "secondary law" (ibid., para. 501). Finally, an accused person should not be tried in absentia but should be lawfully brought before the court. The statute must provide that, if the court found that the accused had been unlawfully brought before it, it should dismiss the proceedings.

96. His delegation welcomed the proposals made in paragraphs 510 to 512 of the Working Group's report with the proviso that, with regard to the initiation of a case, the interests of justice required not only an independent prosecutorial system but also a preliminary inquiry or committal proceedings before a judicial officer. As far as the initiation of a case was concerned, any State party to the statute of the court should be entitled to bring a complaint before the prosecuting body, after which the latter would take over the conduct of the proceedings.

97. The report examined the problem of extradition in paragraphs 518 to 526. A regime for extradition or handing over of the accused would have to be an integral part of the statute, but its precise formulation was a question for consideration at a later stage. Similarly, the report examined the relationship between the court and the existing extradition system (paras. 550-557). Those matters should be addressed at a later stage after the core issues had been settled. As for the question of international judicial assistance (paras. 528-545), some rules on that topic would have to be elaborated, but a detailed treaty annexed to the statute was perhaps not the best solution.

98. The proposals with regard to the implementation of sentences were examined in paragraphs 546 to 549. Although the question of imprisonment following conviction should be considered later, the primary responsibility of carrying out the sentence should fall on the State conferring jurisdiction. However, the question of parole, review, etc., should be left to the relevant body within the court structure. That underlined the need for a permanent court.

(Mr. Al-Baharna, Bahrain)

99. His delegation invited the Commission to consider the possibility of other forms of penalties, including a regime of community service, for offenders who had been found guilty of genocide, racial discrimination and apartheid. A separate and compulsory protocol on the implementation of sentences should be provided so as not to disturb the general tenor or the statute.

The meeting rose at 1.05 p.m.